84-1349

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN MARIETTA, a Maryland Corporation,
Respondent,

versus

JERRY T. BUSTO
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

JERRY T. BUSTO
790 Depew Street
Lakewood, Colorado 80214
(303) 237-1062 or 237-9373
Petitioner, Pro-se

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Jefferson County District Court of the State of Colorado violated Rule 97 (Colorado Rules of Civil Procedure) and the due process clause of the Fifth and the Fourteenth Amendments to the United States Constitution by not holding a hearing on the Motion For a Change of Judge which was filed in a timely manner by the Petitioner.

2. Whether the Jefferson County District Court further violated the Petitioner's right to due process of law under the Fifth and the Fourteenth Amendments to the United States Constitution by making a decision on an issue regarding patents that is within the jurisdiction of a special federal court.

3. Whether the Colorado Court of Appeals violated the Petitioner's right to due process of law under the Fifth and the Fourteenth Amendments to the United States Constitution by finding that the Petitioner's Appeal was frivolous, thus granting double costs against the Petitioner.

LIST OF INTERESTED PARTIES

Jerry T. Busto, Petitioner, Pro-se, certifies that the following listed parties have an interest in the outcome of this case. These representations are in order that the Justices of the Court may evaluate possible disqualifications or recusal.

1. Martin Marietta, a Maryland Corporation, represented by John R. Webb, of Holmes Roberts & Owen, 1700 Broadway, Suite 1800, Denver, Colorado 80290.

2. Jerry T. Busto, Petitioner, Pro-se, 790 Depew Street, Lakewood, Colorado 80214.

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In the
Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN MARIETTA, a Maryland Corporation
Respondent,

versus

JERRY T. BUSTO
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion and Judgment of the Court of Appeals of the State of Colorado affirming the Jefferson County District Court's judgment against the Petitioner appears at APPENDIX "A" and is reported at —P.2d— Slip Opinion Number 82CA092 (Colorado Court of Appeals, April 26, 1984). The Order of the Colorado Court of Appeals denying a Petition For Rehearing appears in APPENDIX "B". The order of the Colorado Supreme Court denying a Petition For a Writ of Certiorari appears in APPENDIX "C". A copy of Petitioner's Request For Assignment of Case to a Different Judge appears in APPENDIX "D". Selected portions of the Reporter's Transcript of the trial in the Jefferson County District Court appear in APPENDIX "E".

JURISDICTION

The Opinion and Judgment of the Court of Appeals of the State of Colorado affirming the Jefferson County District Court's judgment against Petitioner appears at APPENDIX "A" and is reported at —P.2d— Slip Opinion Number 82CA092 (Colorado Court of Appeals April 26, 1984). The order of the Colorado Court of Appeals denying a Petition For Rehearing appears in APPENDIX "B". The Order of the Colorado Supreme Court denying a Petition For a Writ of Certiorari appears in APPENDIX "C". This Petition For a Writ of Certiorari is being filed within ninety days of the Colorado Supreme Court's denial of the Petitioner's Petition For a Writ of Certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

1. Rule 97 of the Colorado Rules of Civil Procedure

Rule 97. Change of Judge
General Consideration
Filing of motion to disqualify a trial judge, etc.

A motion to disqualify the judge has the effect, as a matter of law, of suspending any further proceedings until the Judge rules on the motion to disqualify. City of Trinidad v. District Court, 196 Colo. 106,581 P.2d 304 (1978).

2. Fifth Amendment to the Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Fourteenth Amendment to the Constitution of the United States

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

The Plaintiff-Appellee, MARTIN MARIETTA CORP., hereinafter referred to as "Martin" filed an action on December 11, 1980, in the District Court of Jefferson County, State of Colorado for a Preliminary and Permanent Injunction against the Defendant-Appellant, Jerry T. Busto, hereinafter referred to as "Busto" prohibiting him from divulging any information concerning a trade secret to which Martin claimed exclusive rights and ownership. Various pre-trial motions and hearings were held. One hearing allowed Martin to apply for a Patent on the above mentioned trade secret to which Martin claimed exclusive rights and ownership. On June 30, 1982, Busto filed a Motion for Change of Judge accompanied by affidavit challenging certain bias on the part of the trial judge, Honorable Gaspar Perricone, to which Busto had become aware of.

No hearing was ever held on the Motion for change of Judge and the record is totally void of any ruling having been made or entered on said Motion including even a minute order. The matter proceeded to trial on July 6, 1982. When Busto appeared at trial pro-se, the Honorable Joseph Lilly was presiding. Once again the record is totally void of why Judge Perricone was not presiding or how Judge Lilly came to preside over the matter; Judge Lilly having been a retired judge of the Denver District Court. The only reference found regarding the matter is in Martin's Preliminary Statement filed with the Court of Appeals, under Issues to be Raised on Appeal Sub-Paragraph (a) "Judge Perricone transferred the case to Judge Lilly for Trial".

The record was never supplemented regarding any ruling by the trial Court on Busto's Motion for Change of Judge or on the selection process of Judge Lilly even though Martin knew these matters were at issue from Busto's Preliminary Statement. The record however, was supplemented once by Martin's counsel pursuant to C.A.R. 10(c) a hearing on continuance which was not of record. Appeal Briefs were filed by both parties.

An opinion was rendered by the Court of Appeals on April 26, 1984, wherein the Court affirmed the trial court and held that error, if any committed by the trial judge regarding Busto's Motion for Disqualification was technical in nature and rendered harmless when Judge Perricone disqualified himself and Judge Lilly was appointed. The Court went on to hold the appeal frivolous on the grounds that the Court from review of the record, argument of counsel, and its own research, felt that Busto was unable to present any rational arguments based on evidence or law in support of his claims of error. Double costs were awarded Martin and the matter was remanded to the trial court for determination of C.A.R. 38(d) damages including reasonable attorney's fees. A Petition for Rehearing was filed with the Court of Appeals on May 9, 1984. An Order denying the Petition for Rehearing was entered on June 7, 1984. Petition for a Writ of Certiorari to the Colorado Supreme Court was filed on July 9, 1984. On November 26, 1984 an Order denying the Petition For a Writ of Certiorari was entered.

REASONS FOR GRANTING WRIT OF CERTIORARI

BY NOT HOLDING A HEARING ON THE MOTION FOR A CHANGE OF JUDGE WHICH WAS FILED IN A TIMELY MANNER BY THE PETITIONER, THE JEFFERSON COUNTY DISTRICT COURT OF THE STATE OF COLORADO VIOLATED RULE 97 (COLORADO RULES OF CIVIL PROCEDURE) AND THE DUE PROCESS CLAUSE OF THE FIFTH AND THE FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE JEFFERSON COUNTY COURT FURTHER VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY MAKING A DECISION REGARDING PATENTS THAT IS WITHIN THE JURISDICTION OF A SPECIAL FEDERAL COURT.

BY FINDING THAT THE PETITIONER'S APPEAL WAS FRIVOLOUS, THUS GRANTING DOUBLE COSTS AGAINST THE PETITIONER, THE COLORADO COURT OF APPEALS VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND THE FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Petition presents an important question of first impression concerning the construction of C.R.C.P. 97 as promulgated by the Colorado Supreme Court and the due process clauses of the 5th and 14th amendments to the United States Constitution.

1. On numerous prior occasions the Colorado Supreme Court has been called upon to interpret and give enforcement to the language of C.R.C.P. 97.

The court has clearly held that the requisite of C.R.C.P. 97 are of jurisdictional magnitude. Thus, when a trial court fails to abide by the requisites of Rule 97 it loses jurisdiction of the case and any action or judgment entered thereafter is void. Leone Co. v. District Court, 150 Colo. 47, 48 (1962); Brower v. District Court of First Judicial District, 455 P.2d 207 (Colo. 1969); City of Trinidad v. District Court, etc., 581 P.2d 304 (Colo. 1978); V.T.A., Inc. v. Airco, Inc., 597 F.2d 220 (10th Cir. 1979); In re Marriage of Stroud, 631 P.2d 168 (Colo. 1981). Rule 97 has further been interpreted so as not to require a hearing on a motion thereto. See, Brower Supra. The language of Rule 97 is clear, it mandates a trial court to make a ruling on a motion for disqualification or the Court loses jurisdiction until it does. The Court has held such a mandate does exist in Rule 97 and a Writ of Mandamus may lie as a remedy to compel compliance by the trial court of its duty to make a ruling. See, City of Trinidad Supra; Walker v. People, 248 P.2d 287, 293 (Colo. 1952).

The question which arises in the factual context of this case is unique to all other reported cases concerning Rule 97. In its basic context it can be stated as "what constitutes a ruling for Rule 97 purposes or can a ruling be implied from a silent record". It is the Appellant's contention, that a ruling concerning a Rule 97 disqualification motion must affirmatively appear of record. A ruling as required by mandate of Rule 97 cannot materialize or be fabricated by innuendo from a totally silent record. While the opinion of the Court of Appeals fails to squarely address the issue, by implication of its holding to the facts of this case, the only principle that can be drawn from its opinion is that no ruling need appear of record. Thus a ruling by silence or implication is sufficient to satisfy the mandate of Rule 97 according to the Court of Appeals, but this violates the due process clauses of the 5th and 14th Amendments to the United States Constitution.

Were this Court to allow the Court of Appeals holding to stand, it would seriously undermine the policies underlying Rule 97 and the 5th and 14th amendments to the United States Constitution. The Colorado Supreme Court in addressing a matter concerning the same motion before the same judge as appears here held that the right of a party to a hearing before a fair and impartial tribunal is basic to our system of justice and therefore, not only the actuality of fairness but the appearance of fairness as well, must concern the courts. Therefore, Courts must meticulously avoid any appearance of partiality in order to maintain public confidence in judicial integrity.

The Court of Appeals decision here stands for the proposition that since Judge Perricone did not preside at a trial he must have disqualified himself, no prejudice was incurred by Mr. Busto. The fallacies with applying that type of rationale to

Rule 97 are several. First, perhaps Judge Perricone did not disqualify himelf but only had a scheduling conflict. Secondly, perhaps Judge Perricone did not disqualify himself but chose to pick an alternate Judge to keep from having to disqualify himself. Thirdly, if that line of reasoning is used in a situation such as this, where a motion for disqualification is filed against a judge and he doesn't rule on the motion but ultimately doesn't preside over subsequent proceedings, it must also be applied to a situation where a motion for disqualification is filed and the trial judge again doesn't rule on the motion but does preside over subsequent proceedings. In which case the moving party, attempts to bring an action to compel a ruling. The trial judge or opposing party need only reply that it can be implied from the fact that the trial judge still presides that a ruling denying the motion was entered or meant to be entered. That being the case, the moving party would have no means to attack or challenge the court's inaction or ruling. Lastly, it causes the parties to the action to be forced to play a wait and see game with the Courts. A party files his motion to disqualify and then is compelled to wait and see what happens. If the judge continues in the proceedings, you can assume he denied your motion; but if another judge appears at the next proceeding, you can assume he granted your motion. Such a procedure which the Court of Appeals in its ruling herein invites, is simply not conducive to fundamental notions of fair play and subsequential justice as has been held to be contained in the basic concept of due process of law. The Court by not openly dealing with a motion for disqualification leaves the motion pending and undetermined with the charge of bias and prejudice, even though unproven or defective, remaining as an accusation of unfitness by the Court. In doing so, the Court invites error and doubt resulting in public confidence and judicial integrity withering away in speculation and conjecture. The Court in allowing the procedure of the trial court in this case to go uncorrected sanctions such conduct and deprives Mr. Busto of due process of law. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

It is Petitioner's contention that the Court of Appeals should not have assumed as fact something which does not appear of record (the disqualification) and base its ruling thereon (no prejudice no error). See, Smith v. Davis, 45 S.E. 2d 237, 240 (Ga. App. 1947); 5 C.J.S. Appeal and Error § 1534 p. 1051. It has been held that failure to comply with the provision of a mandatory legal directive constitutes error per se and must be deemed to be prejudicial. Ferderer v. Northern Pacific Ry. Co., 26 N.W. 2d 236, 241 (N.D. 1947).

In the same context, arises the question of how did Judge Lilly come to preside over the trial. Rule 97 provides that "upon disqualifying himself, a judge shall notify forthwith the chief judge of the district who shall assign another judge from another district (Denver) not the first Judicial District." Was Judge Lilly assigned by the chief judge of the 1st Judicial District or was he assigned by or at Judge Perricone's request? A judge against whom a motion for disqualification is filed may not select his successor or assign the case to another judge. Aaberg v. District Court, 319 P.2d 491 (Colo. 1957).

It is the Petitioner's contention that the record presented to the Court of Appeals affirmatively showed error. The disregard of a mandatory legal directive should be held to constitute excess jurisdiction of the court, error per se and deemed to be prejudicial. See, Colorado Appellate Practice-Anatomy of an Appeal, p.41, CLE in Colo. 1982. The decision rendered by the Court of Appeals runs contra to the policies underlying Rule 97, as well as, due process of law.

Mr. Busto's Request For a Change of Judge was accompanied by an affidavit. Also included in the above mentioned request was a list of the names of all the attorneys Busto had tried to hire to represent him. As mentioned earlier, one of the hearings was held for the sole purpose of lifting the temporary injunction long enough to allow Martin to apply for a patent on the trade secret in question. Since a patent had been applied for at the time Busto made his Request For a Change of Judge,

which sould have, by law, stopped the proceedings until the matter had been ruled upon, there was no reason to expedite this case. Martin's rights were protected by applying for the patent. However, Mr. Busto's rights to a fair trial presided over by an impartial judge; a trial at which he was represented by counsel were violated by the fact that Judge Perricone did not call a halt to the proceedings, did not rule on the Request For a Change of Judge, and did, in fact, ignore the whole issue. Jefferson County District Court should have lost its jurisdiction when Martin applied for a Patent, as deciding an issue involving patents is within the jurisdiction of a special Federal Court.

The Court of Appeal's decision that this appeal is frivolous and the granting of Appellee's Motion for Rule 38(d) Sanctions is contra to decisions of the Colorado Supreme Court, as well as other Court of Appeal's decisions. It also denies the Petitioner due process of law and created an unwarranted chilling effect on his counsel's obligation to zealously represent him.

It is the Petitioner's contention that the Appeal was not frivolous. Petitioner's brief to the Court of Appeals, his Petition for Rehearing and Petition for Writ of Certiorari all represent a justifiable issue. While obviously the Court of Appeals was not convinced by Petitioner's legal proposition and argument, the Colorado Supreme Court has held the mere fact an appeal proves unsuccessful or advance a claim or defense not recognized under existing law is not ground for holding an appeal to be frivolous. Western United Realty, Inc. v. Isaacs, 82SC64, 14 Colo. Law. 939 (1984). Thus an appeal which presents an issue of first impression or advance novel theories of law, or good faith efforts to attempt to extend, modify or reverse existing law is meritorious enough to withstand allegations of frivolousness. Wyatt v. United Airlines, Inc. 638 P. 2d 812 (Colo. App. 1981); City of Imperial Beach v. Palm Ave. Book, Inc., 171 Cal. Rptr. 197, 200 (Cal. App. 1981). The record, when reviewed most favorable to the Petitioner, clearly fits in the above categories and as such should not have been held to be frivolous.

Even were this appeal to be frivolous, which Petitioner denies, the Court of Appeals award of damages in the nature of reasonable attorney's fees is directly contra to the Colorado Supreme Court's holding In Re the Marriage of Mann, 655 P. 2d 814 (Colo. 1982) and Division III of the Court of Appeals holding In Re the Marriage of Trask, 580 P. 2d 825 (Colo. App. 1978).

In Mann the Colorado Supreme Court after maintaining the appeal as frivolous refused to award appellee attorney's fees because she failed to specify an amount of damages in her motion. The rule 38(d) motion filed by Martin herein likewise failed to state any amount of damages. The Colorado Supreme Court's decision in Mann is in conformity with the Court of Appeal's decision in Trask, when the Court of Appeals granted attorney's fees pursuant to C.A.R. 38 because a specific amount was requested and supported by an accompanying affidavit.

A motion pursuant to C.A.R. 38(d) alleging a frivolous appeal and filed approximately 16 months after the appeal is filed but only 17 days before scheduled oral argument and to which Petitioner had only one minute to respond to does not provide Petitioner with adequate notice and opportunity to be heard by due process of law. Such a situation is contra to the Colorado Supreme Court's holding that before an Appellant could be charged with damages pursuant to C.A.R. 38(d), he must be given adequate notice and opportunity to be heard. Seven days notice when Appellee has 16 months to file its motion is not sufficient notice. Additionally, one minute in which to respond to the allegation of frivolousness and claim of damages can hardly be held to rise to an opportunity to be heard. The Court's request for oral argument on the merits of the motion constitutes total surprise to the Petitioner and his counsel of record at the time and is contra to Rule 27(e).

The Court of Appeals has denied the Petitioner's due process of law in holding him accountable for a standard that was vague. The Colorado Supreme Court has held that the standard of determining frivolousness prior to International

Technical Instruments, Inc. v. Engineering Measurements Co., 12 Colo. Law 1683 (Colo. App. 1983), were vague. This appeal and corresponding briefs were filed prior to International. Therefore, Petitioner was not adequately apprised of what constituted a frivolous appeal and cannot subsequently be penalized for committing a wrong he was not adequately apprised of at the time. If the standards were vague, the Petitioner cannot be held accountable for not complying with or violating them. To do so denies the Petitioner due process of law.

CONCLUSION

For all the foregoing reasons, it is submitted that this Petition for Writ of Certiorari should be granted, thereby allowing this Court to correct the manifest error in the trial court, and fulfill the "due process" guarantees of the Fifth and the Fourteenth Amendments to the United States Constitution.

JERRY T. BUSTO, PETITIONER-PRO-SE
790 Depew Street
Lakewood, Colorado 80214
(303) 237-1062 or 237-9373

MARTIN MARIETTA,
a Maryland Corporation
Respondent,

versus

JERRY T. BUSTO
Petitioner

AFFIDAVIT OF SERVICE

I, JERRY T. BUSTO, PETITIONER PRO-SE, being of lawful age, and after having been first duly sworn upon oath, depose and state:

1. That on the 25 th day of February, 1985, I served three copies of The Petition for Writ of Certiorari which is attached hereto on all parties required to be served under Rule 28 of the United States Supreme Court, as follows:

John R. Webb, attorney for Martin Marietta Corporation, at Holme Roberts & Owen, 1700 Broadway, Suite 1800, Denver, Colorado 80290.

Jerry T. Busto

Jerry T. Busto, Petitioner-Pro-Se

Subscribed and sworn to before me this 27 th day of February, 1985.

My commission expires: Oct. 1, 1987

Notary Public

BEST AVAILABLE COPY

APPENDIX "A"

No. 82CA0892

MARTIN MARIETTA, a Maryland corporation,
Plaintiff-Appellee,

v.

JERRY T. BUSTO,
Defendant-Appellant

Appeal from the District Court of Jefferson County
Honorable Gaspar F. Perricone, Judge
Honorable Joseph N. Lilly, Judge

DIVISION II
Opinion by
JUDGE VAN CISE
Smith and Berman, JJ., concur

JUDGMENT AFFIRMED
AND CAUSE REMANDED
WITH DIRECTIONS

Holme Roberts & Owen
John R. Webb
Elaine A. Truitt
Denver, Colorado

Attorneys for Plaintiff-Appellee

Thomas W. Koelling
Colorado Springs, Colorado

Attorney for Defendant-Appellant

In this action premised upon violation of plaintiff's trade secrets, defendant Jerry T. Busto, appeals a judgment in favor of plaintiff, Martin Marietta Corporation, granting it an injunction and a declaratory judgment and dismissing defendant's counterclaim. We affirm.

The only claims of error raised on appeal pertain to alleged "irregularities in the proceedings." Thus, it is unnecessary to relate the facts pertaining to the subject matter of the lawsuit.

I. "Irregularities" Alleged by Defendant

A.

Under the circumstances of this case, the trial court did not abuse its discretion in denying defendant's request for a continuance on the basis of lack of counsel. Nearly six months before trial date, in open court, defendant consented to his former counsel's withdrawal. He was advised by the court at that time and subsequently that it was up to him to obtain counsel and that a continuance would not be granted for lack of counsel.

B.

The technical error, if any, in not specifically ruling on defendant's motion for change of judge, filed less than 10 days before trial date, was rendered harmless when the original judge (Judge Perricone) disqualified himself and another judge (Judge Lilly) was appointed and presided over all subsequent proceedings, including the trial to the court and post-judgment matters.

C.

There was no error in the trial court's vacating its prior order denying defendant's motion for a new trial when, as here, the motion to vacate was made in a timely fashion. Ranger

Insurance Co. v. District Court, 647 P.2d 1229 (Colo. 1982). In its "findings of fact, conclusions of law and judgment," the court had specifically reserved the issue of recoverability of plaintiff's attorney's fees. Until this matter was determined, the judgment was not final or appealable. Ortega v. Board of County Commissioners, 657 P.2d 989 (Colo. App. 1982). And, until the judgment became final, the trial court retained jurisdiction.

D.

At the time of the post-trial hearing on costs and attorney's fees, a new attorney entered his appearance for defendant. At that time he asked leave to withdraw the original new trial motion so he could make amendments thereto. The request was denied.

Review of this claimed error is precluded because no statement or offer was made as to what additional grounds the new counsel intended to raise and no amended motion was ever offered. See Larsen v. Archdiocese of Denver, 631 P.2d 1163 (Colo. App. 1981). We are unable from this record to determine whether the claimed error was prejudicial. Therefore, error, if any, was harmless.

II. Plaintiff's "Motion for Sanctions"

Seven days before oral argument, plaintiff's attorney filed with this court and served on opposing counsel a "motion for sanctions." In the motion, it asked this court, pursuant to C.A.R. 38(d), to award double costs and, as damages, its attorney's fees incurred on this appeal, on the basis that this appeal is frivolous. The parties were advised by this court to be prepared to argue the merits of this motion at the scheduled oral argument on the appeal. The matter was argued by both parties.

From our review of the record, the arguments of counsel, and our own research, we find that the defendant was unable to present any rational argument based on the evidence or law in support of his claims of error on this appeal. Therefore, we conclude that the appeal was and is frivolous. See Western United Realty, Inc. v. Isaacs, —P.2d— (Colo. No. 82SC64, March 26, 1984), and Mission Denver Co. v. Pierson 674 P.2d 363 (Colo. 1984).

The judgment is affirmed, and plaintiff shall recover double costs. The cause is remanded with directions to conduct a hearing to determine the C.A.R. 38(d) damages, including the amount of a reasonable fee for plaintiff's attorneys on this appeal, see Rogers v. Charnes, 656 P.2d 1322 (Colo. App. 1982), and to enter judgment accordingly.

JUDGE SMITH and JUDGE BERMAN concur.

APPENDIX "B"

IN THE COURT OF APPEALS
OF THE STATE OF COLORADO

Case Number 82 CA 0892

MARTIN-MARIETTA, a Maryland corporation,	)	
Plaintiff-Appellee	)	
vs.	)	ORDER
JERRY T. BUSTO, Defendant-Appellant	)	

Upon consideration of the Petition for Rehearing filed by the appellant herein, said Petition is hereby denied. Unless otherwise ordered, mandate shall issue 6-14-84.

BY THE COURT,

DATED: 6-7-84

If certiorari to the Supreme Court is planned and a stay of issuance of mandate desired, petition for such stay must be filed in the Court of Appeals prior to the above date of issue.

APPENDIX "C"

SUPREME COURT, STATE OF COLORADO
CASE NO. 84SC252
CERTIORARI TO THE
COLORADO COURT OF APPEALS, 82CA0892

ORDER OF COURT

JERRY T. BUSTO,
Petitioner(s)

vs.

MARTIN-MARIETTA, a Maryland corporation,
Respondent(s).

Upon consideraton of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of the Court of Appeals,

It Is This Day Ordered that said Petition for Writ of Certiorari shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, November 26, 1984.
JUSTICE QUINN does not participate.

cc: Mac V. Danford, Clerk
Colorado Court of Appeals

THOMAS W. KOELLING, ESQ.
1112 North Wahsatch Avenue
Colorado Springs, Co. 80903

HOLME ROBERTS & OWEN
John R. Webb, Esq.
1700 Broadway, Ste 1800
Denver, Co. 80290

APPENDIX "D"

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF JEFFERSON
STATE OF COLORADO
Civil Action No. 80-CV-3763
Division 2

MARTIN MARIETTA CORPORATION, Plaintiff,	)	
vs.	)	REQUEST FOR ASSIGNMENT OF CASE TO
JERRY T. BUSTO Defendant.	)	A DIFFERENT JUDGE

COMES NOW the Defendant, in propria persona, and, pursuant to C.R.C.P. Rule 97, respectfully moves that the judge in the above titled case, the Honorable Gaspar F. Perricone, disqualify himself and assign this case to a different judge.

1. The record in this case indecates *(sic)* that the Honorable Gaspar F. Perricone has shown a large measure of favoritism toward the Plaintiff, and that such action has been to the detriment of the Defendant.

2. The Court allowed the Defendant's former attorney of record in this case, Mr. John G. Taussig, Jr., to withdraw as council *(sic)* for the Defendant without a hearing or inquiry into the reasons for the withdrawl *(sic)*, and without inquiry as to whether the Defendant had obtained other council *(sic)*. Defendant was given no notice of the pending withdrawl *(sic)*, which was presented in a motion to this court at an emergency hearing held on December 11, 1982. Defendant was given no advice by the Court as to his rights concerning the withdrawl *(sic)* of his attorney. This action left the Defendant with no

other option but to proceed pro-se. The Defendant was thus deprived of representation, and not being an attorney himself, cannot properly represent himself before the court. Defendant has not been able to obtain other council *(sic)*, although he has made numerous efforts to do so. Defendant has tried, in vain, to obtain the following council *(sic)* to represent him in this case; Jerry Spence, Joseph Branney, Paul Baca, Leo Gemma, Scott Robinson, Elizabeth Meyer, and Jim Kissel. Each of these attorneys hase *(sic)* declined either because of the short notice of such a complex case, or because of prior commitments.

3. The Court has, on numerous occasions, refused to assist the Defendant in the mechanics of preparing and presenting his case although the Defendant has requested such assistance. Defendant believed in good faith that he was entitled to such assistance because of the fact that he is without council *(sic)* through no fault of his own.

4. The Court has, on numerous occasions, held in-camera conferences of which no record has been made, even though the making of transcripts was requested by Defendant. At these sessions the Defendant has been denied the opportunity to speak by the Court, and favoritism and assistance was afforded to the Plaintiff by the Court.

5. The Court has been made aware of the fact that the Defendant is a friend and former associate of John M. Mann, the appellant in case No. 81SA410, presently before the Colorado Supreme Court, such appeal having been taken from the Permanent Orders issued by the Honorable Gaspar F. Perricone in Jefferson County District Court, Case No 78D1404. The Defendant has read the Briefs filed in Mr. Mann's appeal and notes that the allegations of bias and prejudice raised by Mr. Mann to the actions of Judge Perricone in 78D1404 are similar to those raised by the Defendant herein. This Court learned of the connection when Defendant came in to pay for Mr. Mann's copy of the transcript in his case, since Mr. Mann was out of town and could not come himself. Defendant discussed his friendship and relationship to Mr. Mann at that time with Judge Perricone's secretary, Charlene. Since that time this Court has overtly evidenced toward the Defendant, similar types of bias and prejudice as complained of by Mr. Mann in his appeal.

Judge Perricone's secretary, Charlene. Since that time this Court has overtly evidenced toward the Defendant, similar types of bias and prejudice as complained of by Mr. Mann in his appeal.

6. Judge Perricone exhibited extreme favoritism for the Plaintiff and prejudice against the Defendant when he denied Defendant's motion to supress *(sic)* the file stating that the surest way to get the press interested was to supress *(sic)* a file, and then turning right around and supressing *(sic)* parts of the file upon request by the Plaintiff. The Court could have advised the Defendant that it would have been proper to supress *(sic)* only those parts of the file which contained the very secret subject technology involved in this case. The Court was well aware of the need for secrecy as Judge Perricone, himself had ordered that the depositions of witnesses containing the subject technology be delivered to the Court under lock and key and be kept supressed *(sic)*. When Defendant requested that the Court supress *(sic)* the file to protect the secret, after learning that it was open to the gereral *(sic)* public, he was dismissed by the Court. Even after Plaintiff had assured the Defendant, and the Court that their para-legal staff had gone through the file and removed all mention of the subject technology, Defendant discovered that mention of the subject technology and the actual subject technology itself was still in the open file.

7. Judge Perricone is aware that the Defendant is still without council *(sic)*, through no fault of his own, and yet at an in-camera pre-trial conference held on June 11, 1982, Judge Perricone declared that their *(sic)* will be no continuences *(sic)* in this case. It is impossible for Defendant to obtain council *(sic)* in time to properly defend him in this case by the trial date of July 6, 1982.

8. Pursuant to the foregoing, the Defendant believes that he has been denied due process of law and that it will be impossible for him to receive a fair and impartial trial from the Honorable Gaspar F. Perricone.

Defendant has attached his affidavit to the Court as required by C.R.C.P. Rule 97.

WHEREUPON, Defendant prays that this Honorable Court grant an order to disqualify the Honorable Gaspar F. Perricone from sitting in this case and reassign this case to a different judge.

JERRY T. BUSTO, Defendant Pro-se
790 Depew Street
Lakewood, Colo. 80214
237-1062

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF JEFFERSON
STATE OF COLORADO
Civil Action No. 80-CV-3763
Division 2

MARTIN MARIETTA CORPORATION Plaintiff,	)
vs.	)AFFIDAVIT OF)JERRY T. BUSTO
JERRY T. BUSTO Defendant.	)

I, Jerry T. Busto, being of legal age and being duly sworn, do swear under oath as follows:

1. I am the Defendant in the above titled case.

2. I am presently without council *(sic)* and am appearing pro-se in the above titled case due to the court allowing my attorney to withdraw without proper consideration for me and my situation.

3. I have requested the assistance of the Court in preparing and presenting my case, and such assistance has been denied me. It is my belief that the Court is obligated to provide such assistance as I am not an attorney nor have I been able to obtain an attorney to represent me in the above titled case. Such denial of assistance is, I believe manifestly unfair and amounts to denial of due process.

4. The Honorable Gaspar F. Perricone has evidenced bias and prejudice toward me and simultaneously shown favoritism toward the Plaintiff by denying me transcripts, continuences *(sic)*, and assistance, and by offering the Plaintiff advise *(sic)* as to procedure and option.

5. The Honorable Gaspar F. Perricone harbors bias and prejudice against me due to my association with John M. Mann, an individual against whom Judge Perricone has an intence *(sic)* dislike as evidenced by the contents of M. Mann's trial and appeal records in cases no. 78 D 1404 (Jefferson County) and 81SA410 (Colorado State Supreme Court).

6. I believe that I cannot obtain a fair and impartial trial from Judge Perricone as evidenced by the forgoing *(sic)*.

_____

Jerry T. Busto

I declare that I have read the foregoing affidavit and the statements contained therein are true to the best of my know-

ledge and belief. I further declare that I have read the REQUEST FOR ASSIGNMENT OF CASE TO A DIFFERENT JUDGE to which this affidavit is attached, and it is by me and the statements contained therein are true and correct to the best of my knowledge and belief.

_____

Jerry T. Busto

SUBSCRIBED AND SWORN to before me this____ day of _____, 1982 by Jerry T. Busto.

_____

Notary Public
(Seal)

My commission expires: _____

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the REQUEST FOR ASSIGNMENT OF CASE TO A DIFFERENT JUDGE and the AFFIDAVIT OF JERRY T. BUSTO was deposited in the United States Mail, postage prepaid, on this____ day of , 1982, addressed to the following.

John R. Webb
1700 Broadway
Denver, Colorado 80209

_____

Marla J. Busto

APPENDIX "E"

DISTRICT COURT
COUNTY OF JEFFERSON
STATE OF COLORADO

Case No. 80-CV-3763

REPORTER'S TRANSCRIPT

MARTIN MARIETTA CORPORATION,

Plaintiff,

v.

JERRY T. BUSTO,

Defendant.

The Trial in this matter commenced on Tuesday, July 6, 1982, before the HONORABLE JOSEPH LILLY, Judge of the District Court.

FOR THE PLAINTIFF: JOHN R. WEBB (#1876)

FOR THE DEFENDANT: PRO SE JERRY T. BUSTO

INDEX

WITNESSES:

For the Plaintiff:	DIRECT	CROSS	REDIRECT	RECROSS
Stanley Sawicki	17			
Morris McLain	20			
Robert E. Burnett	23			
Mohan S. Misra	28			
Dr. David Leroy Olson	61			
Philip DeArment	73			

EXHIBITS:

For the Plaintiff:	Identified	Offered	Accepted
1. 1957 Patent Agreement	16-15	16-15	17-10
2. 1977 Patent Agreement	17-2	17-7	17-10
3. Mr. Busto's Affidavit	17-4	17-7	17-10
4. Policies — 3 pgs. 3-19-56	19-9	10-5	10-9
5. Articles and Plans of Martin Marietta	22-2	22-13	22-16
6. J.T. Busto employment history - 3 pgs.	24-10	24-18	24-21
7. Job description	26-19	27-6	27-12
8. Misra's Proposal	38-7	38-14	38-23
9. Permission Document	46-8	46-16	46-20
10. Chemical Sales Purchase	47-5	47-23	

EXHIBITS (continued)

For the Plaintiff:	Identified	Offered	Accepted
11. Chemical Sales Billing	47-9	47-23	
12. Denver Aerospace Purchase	48-18	49-14	49-15
13. Bennett & Assoc Biling *(sic)*	49-4	49-14	49-15
14. Misra's handwritten Instructions	53-13	53-29	53-23
15. Final Report	58-6	58-13	58-21
16. Professional Qualifica-cations of Dr. Olson	62-16	62-20	62-23
17. Dr. Olson's Drawing	68-15	68-23	71-5
18. Mr. Busto's Memo to DeArment	74-24	75-19	75-20
19. Letter DeArment to Jerry Busto (copy)	76-24	76-21	77-7
20. John Taussic's letter	78-21	80-13	80-15
21. Complaint-Boulder	78-23	80-14	80-15

PLAINTIFF'S CLOSING ARGUMENT WAIVED on page 83-23

DEFENDANT'S CLOSING ARGUMENT WAIVED on page 84-1

FINDINGS OF THE COURT: Page 84

PROCEEDINGS

(Whereupon Court convened at 9:00 a.m.)

THE COURT: 80--CV-3763, Martin Marietta versus Jerry T. Busto.

MR. WEBB: John R. Webb of Holme Roberts & Owen and Morris McLain who is in-house counsel with Martin Marietta. We are ready to proceed.

THE COURT: All right. Do you have 9:00 on your watch?

MR. WEBB: Yes, Your Honor.

THE COURT: Is Mr. Busto in the courtroom? I want to take one precaution. I want to call Judge Perricone's division and make sure he isn't down there. Would you do that and I'll remain in attendance while you make the phone call. Just go to the clerk's office and do it.

You are Mr. McLain?

MR. MCLAIN: M-c-L-a-i-n.

THE COURT: All right. How do you spell DeArment?

MR. MCLAIN: D-e-a-r-m-e-n-t.

THE COURT: You're Mr. Busto?

MR. BUSTO: Yes, Your Honor.

THE COURT: Tell Mr. Webb he's here. He's here, Mr. Webb I just called the case. Are you ready for trial?

MR. BUSTO: Yes, Your Honor.

THE COURT: Mr. Busto, I want to get one thing on the record. I understand that you have been advised since you are pro se counsel, you're going to--you have to play by the rules of evidence and procedure. You understand that, don't you?

MR. BUSTO: Okay, Your Honor. I want to object to the proceedings this morning because I do not have counsel.

THE COURT: Objection overruled. Your request for a continuance is already passed on and you have assignment to a different judge as you requested. So, we are ready to proceed.

MR. BUSTO: May I present a motion for new trial.

THE COURT: Well, we haven't had a trial yet. You can't have a new trial until you have had one trial. You haven't had one trial. You can't have a motion to new trial until you've had the first one. That is what you are talking about is motion for new trial?

MR. BUSTO: I want to appeal.

THE COURT: There is nothing to appeal from yet. There hasn't been a ruling in this case. You can't appeal until you've had a ruling in this case unless you want to appeal for something that already happened.

MR. BUSTO: Your Honor, I can't anticipate because I don't know what to do.

THE COURT: Well, that's not my problem. Mr. Busto, you had an opportunity to get counsel. This case has been pending a long time. You were told no further continuance. So, I have no choice but to proceed. Those matters were already resolved prior to my getting into the case. So, I'm ready to try it. You may make an opening statement.--

MR. BUSTO: Your Honor,--

THE COURT: --What do you want to say for the record?

MR. BUSTO: May I note my objection?

THE COURT: You will have a continuing objection in this trial. Everything that we are doing, you can object to.

MR. BUSTO: Thank you.

THE COURT: Show that your objection is on the record. If you have something specific that you want to say, don't hesitate to rise and call it to the Court's attention.

MR. BUSTO: Thank you.

THE COURT: We want to protect yourself as much as we can. I can't try the case. I'm not your lawyer. I notice in one instance you made reference to Judge Perricone wouldn't help you prepare your case. The Judge's function is to resolve the dispute. As far as preparing the case, you have to do it yourself or get yourself counsel. I want you to understand my position. I can't help you try your lawsuit.

You may make an opening statement, Mr. Webb.

MR. WEBB: I have two preliminary matters. I would tender to the Court a ring-binder of exhibits previously marked. These are unofficial reference for the Court's reference. I also tender to the Court a copy of Conclusion of Law and Judgement *(sic)* which at the conclusion of the evidence we ask that the Court enter.

THE COURT: All right. We will enter that later. Now, you understand he is going to make an opening statement. He's going to tell us what his case is about. You'll have the same opportunity to make an opening statement and tell the Court what your case is. Do you understand that?

MR. BUSTO: Yes.

THE COURT: All right.

MR. WEBB: Your Honor, the differences in this case will deal with a problem unique and important to the steel industry, unknown methods of manufacturing steel involving the lowering of the large graphite electrodes, perhaps six foot in diameter in length, to iron ore and other components that become steel. By passing electric current, intense heat is created and the steel manufacturing process occurs.

There is, however, a cost to this process. Because of the intense heat, the graphite in the electrode is burned up, or as the expert witnesses may call it oxidized, depending on the efficiency of the steel mill. The mere process of burning up the graphite electrode can add as much as $15 a ton to the cost of steel manufacturing

This must be viewed as against the annual steel production in the United States of 30 to 40 million tons.

Evidence before the Court will deal with an invention. And before I go into detail on that, Your Honor, I would ask that the Court rule that the record in this case should be sealed and that persons other than those associated with the litigants be excluded from the courtroom. And the three gentlemen and the lady on my right are all employees of Martin Marietta Corporation.

THE COURT: Anybody else in the courtroom who is not?

MR. WEBB: Not that I can determine, Your Honor.

THE COURT: The motion is granted. The record is sealed. There is nothing anyway up to now disclosing a trade secret as far as the pleadings are concerned.

MR. WEBB: That is our concern, Your Honor.

THE COURT: The transcript is ordered sealed and the record of this proceeding is ordered sealed. And you keep an eye for any witnesses not supposed to be in the courtroom.

THE COURT: Well, I'm not letter perfect either. It's not important at this time. Go ahead.

MR. WEBB: Mr. Busto worked in various positions with Martin Marietta Corporation between 1957 and 1977. During that time, he made some discoveries which he voluntarily turned over to Martin Marietta and for which he received small awards.

In 1977, Mr. Busto signed a second agreement which likewise provided among other things that any discoveries made by him would be property of his employer. By this time, 1977, Mr. Busto was working as a laboratory technician performing quite sophisticated tests. After he signed the 1977 agreement, he continued working as a laboratory technician until December of 1978 at which time he became involved in the technology that's subject of this lawsuit.

Changing the focus for just a moment to Misra, who is a native of the country of India now a citizen of the United States. He holds graduate degrees in manufacturing and metalurgy *(sic)*. Mr. Misra joined Martin Marietta Corporation in 1975. Moving forward to approximately the summer of 1978, Mr. Misra was approached--

THE COURT: Who is the gentleman in the back of the courtroom?

MR. WEBB: I don't know, Your Honor.

THE COURT: Are you a witness?

UNIDENTIFIED SPEAKER: No.

THE COURT: Sorry, we will have to excuse you. This involves technical matters and trade secrets. You won't be permitted to stay.

UNIDENTIFIED SPEAKER: I was told differently the other day by the Judge.

THE COURT: I didn't hear you.

UNIDENTIFIED SPEAKER: I was told differently the other day by the Judge.

Office-Supreme Court, U.S.
FILED
MAR 26 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1349 (2)

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

JERRY T. BUSTO,
Petitioner,

vs.

MARTIN MARIETTA CORPORATION,
A MARYLAND CORPORATION,
Respondent.

On Writ of Certiorari from the Colorado Court of Appeals

BRIEF IN OPPOSITION

HOLME ROBERTS & OWEN
KENNETH J. BURKE
JOHN R. WEBB
KATHERINE J. PECK
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Denver, Colorado 80290
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No. 84-1349

In The
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October Term, 1984

JERRY T. BUSTO,
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vs.

MARTIN MARIETTA CORPORATION,
A MARYLAND CORPORATION,
Respondent.

On Writ of Certiorari from the Colorado
Court of Appeals

BRIEF IN OPPOSITION

STATUTES INVOLVED IN THE CASE

1. Rule 97 of the Colorado Rules of Civil Procedure

RULE 97. CHANGE OF JUDGE

A judge shall be disqualified in an action in which he is interested or prejudiced, or has been of counsel for any party, or is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper for him to sit on the trial, appeal, or other proceeding therein. A judge may disqualify himself on his own motion for any of said reasons, or any party

may move for such disqualification and a motion by a party for disqualification shall be supported by affidavit. Upon the filing by a party of such a motion all other proceedings in the case shall be suspended until a ruling is made thereon. Upon disqualifying himself, a judge shall notify forthwith the chief judge of the district who shall assign another judge in the district to hear the action. If no other judge in the district is available or qualified, the chief judge shall notify forthwith the court administrator who shall obtain from the Chief Justice the assignment of a replacement judge.

2. Rule 38(d) of the Colorado Appellate Rules

RULE 38. SANCTIONS

(d) *Sanctions for Frivolous Appeal.* If the appellate court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

3. 28 U.S.C. § 1912 (1982)

§ 1912. *Damages and costs on affirmance*

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

STATEMENT OF THE CASE

Petitioner, Jerry T. Busto ("Busto") provided a statement of the case to this Court in his petition for certiorari review. Respondent, Martin Marietta Corporation ("Martin"), does not dispute Busto's characterization of the history of the case. The only fact Martin does dispute is Busto's assertion that the record does not reflect a ruling on his motion for a change of judge.

Busto correctly informs this Court that he filed a motion for a change of judge on or about June 30, 1982. However, Busto falsely asserts that the record is void of any ruling on the motion. The

record reflects that the judge to whom Busto objected, Judge Perricone, disqualified himself and that a different judge, Judge Lilly, presided at the trial. This ruling is reflected in the trial transcript at the outset of the trial (See Appendix to Petition, p. A-17) and at the conclusion of the trial. (See Appendix A).

Busto filed his notice of appeal at the conclusion of the trial. Busto subsequently filed a preliminary statement and a brief, neither of which presented a federal due process issue. (See Appendices B and C). Though Busto raised an issue concerning his motion for a change of judge, he questioned the requirements of Rule 97 of the Colorado Rules of Civil procedure and not procedural due process requirements. Moreover, Busto raised no issue concerning the court's powers to adjudicate an issue involving patents. Even if he had raised this issue, the proceedings below involved trade secrets and not a patent.

On March 26, 1984, seven days prior to scheduled oral arguments before the Colorado Court of Appeals, counsel for Martin filed, and served upon counsel for Busto, a motion for sanctions in which it requested recovery of its attorneys' fees and costs. (See Appendix D). Counsel for both Busto and Martin presented arguments to the court on this issue. The court of appeals subsequently affirmed the judgment against Busto and awarded attorneys' fees and double costs to Martin.

ARGUMENT

I. The petition for writ of certiorari should be dismissed for lack of jurisdiction.

Busto bases all three issues presented in his petition for a writ of certiorari on the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Busto fails to show that either of the first two issues, whether constitutional due process requires a hearing on a motion to disqualify a judge and whether a decision by a state court regarding patents violates federal due process requirements, was ever presented for review in State court.

The only issue that Busto raised previously was whether the finding by the Colorado Court of Appeals that his appeal to that court was frivolous, and its resulting award of legal fees incurred on appeal violated due process because of an allegedly vague standard of frivolity and purported lack of adequate notice. Even if properly preserved, this issue raises no substantial federal question.

A. This Court lacks jurisdiction to review issues not properly raised in previous proceedings.

Busto alleges jurisdiction under 28 U.S.C. § 1257 (1982). This statute allows a petitioner to seek certiorari review if, in the state court, the petitioner has "specially set up or claimed under the Constitution . . . of . . . the United States" the right or claim the petitioner wishes the Court to address. 28 U.S.C. § 1257(3) (1982), *construed in Webb v. Webb*, 451 U.S. 493 (1981). Failure to raise the federal question in the proceedings below compels dismissal of the petition for lack of jurisdiction. *Webb v. Webb*, 451 U.S. 493 (1981).

This Court's refusal to grant certiorari to decide issues not properly raised or addressed in the state courts preserves important constitutional concerns. In the *Webb* case, this Court likened the "properly-raised-federal-question" doctrine to the exhaustion of state remedies requirement applicable to federal habeas corpus review of constitutional claims of state prisoners. *Webb*, 451 U.S. at 500. In so doing, this Court emphasized the underlying policy as being one based on "federal-state comity," in which federal courts will not upset a state court's ruling, without first giving the state court the opportunity to pass upon the federal issue. *Webb*, 451 U.S. at 500, *citing Picard v. Connor*, 404 U.S. 270 (1971).

Busto fails to show that the state courts of Colorado had any opportunity to pass upon the first two due process issues he now raises in his petition. Busto bears the burden of establishing juris-

diction. Sup. Ct. R. 21.1(h). In fact, the record shows that Busto did not present either the first or second issue in any of the proceedings below.

Petitioner's first issue, whether federal due process requires a hearing on a motion for a change of judge,[1] has never been raised in the context of federal due process requirements. Rather, Busto alleged error based on the language of Rule 97 of the Colorado Rules of Civil Procedure. (See Appendices B and C).

In his brief to the Colorado Court of Appeals, Busto framed the issue as follows:

> a. The trial judge failed to rule on the Defendant's Motion for a Change of Judge under Rule 97, C.R.C.P., although timely filed and to the Defendant's prejudice.

This statement of the issue, and the succeeding argument, make no mention of procedural due process, state or federal. Busto did not assert a specific hearing requirement. Instead, he questioned whether the Rule required a specific *ruling* on the motion, despite the fact that transfer to a different judge appears from the record. (See Appendix B). Busto similarly phrased the issue in his petition for a writ of certiorari to the Colorado Supreme Court. (See Appendix C).

Busto's second issue, whether the Jefferson County District Court violated petitioner's due process rights by purportedly deciding a matter regarding patents, likewise finds no mention among the alleged errors presented to the Colorado appellate

---

[1]This first issue also presents the question of whether Rule 97 of the Colorado Rules of Civil Procedure requires a hearing. This question is clearly not a federal question. Moreover, the Colorado Supreme Court has ruled on this precise issue, and held that Rule 97 does *not* require a hearing. *Brouwer v. District Court of the First Judicial District*, 169 Colo. 303, 455 P.2d 207 (1969).

courts. (See Appendices B and C). No state court ever ruled upon the issue, nor did petitioner ever present the issue for resolution.[2]

Busto's failure properly to raise and preserve issues for appeal precludes him from obtaining review of those issues by this Court. Busto's first two issues should be dismissed for lack of jurisdiction.

B. Busto's objection to the assigned judge was rendered moot by the fact that a different judge heard the case.

Even if Busto properly raised a due process issue regarding his request for assignment of the case to a different judge in the proceedings below, the fact that Busto obtained a different judge rendered this issue moot. The Jefferson County District Court was guilty of, at most, a technical error, which had no prejudicial effect on the rights of Busto. The Colorado Court of Appeals so held. (See Appendix to Petition, p. A-2).

Moreover, contrary to the assertions of Busto, the record reflects the fact that Judge Perricone had "disqualified himself." (See Appendix A). At the outset of the trial, Judge Lilly informed Busto that he had "assignment to a different judge as he had requested." (See Appendix to Petition, p. A-17). Certiorari review cannot be justified based on the mere absence of a minute order granting Busto's motion to disqualify, where the record shows that Busto got the relief that he requested.

---

[2]Even if Busto had asserted a jurisdictional defense on the basis that the federal courts have exclusive jurisdiction to decide matters involving the validity of a patent, the defense would have been inapplicable to the issues actually presented in the case below. Martin sought to enjoin Busto from violating his employment agreement and common law duties by divulging trade secrets and to declare the parties' respective rights in the subject technology. (See Appendix E).

C. A determination by a state court that an appeal is frivolous, thus entitling the prevailing party to recover double costs and legal fees pursuant to the state's procedural rules, does not present a federal question.

Federal due process requires that a person may not be deprived of life, liberty or property without due process of law. U.S. Const. amend. V and amend. XIV, § 3. Busto presents a constitutional issue only if the Colorado Court of Appeals did not provide sufficient procedural safeguards before imposing sanctions, or utilized an impermissibly vague standard. Before the imposition of sanctions against a litigant, the litigant must be given "fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980).

The record shows that Busto received fair notice. Counsel for Martin filed a motion for sanctions on or about March 26, 1984, a copy of which was mailed to counsel for Busto on that day. (See Appendix D). This motion requested the Colorado Court of Appeals to award Martin its attorneys' fees and double costs on the ground that Busto's appeal was frivolous. The motion further indicated that counsel for Martin would be prepared to address the issue of sanctions at argument before the court which was set for April 3, 1984. Busto has acknowledged that he received this motion seven days prior to oral argument (See Petition, p. 11). The due process requirement of "fair notice" cannot require more.

Busto admittedly had an opportunity to be heard on the issue of sanctions. (See Petition, p. 11). Busto's counsel did, in fact, argue it. (See Appendix to Petition, p. A-3). Busto's claim of total surprise regarding this opportunity to be heard, directly contradicted by statements of the court (See Appendix to Petition, p. A-3), and by Martin's motion for sanctions, is disingenuous, and an imposition on this Court.

Busto also argues that the standard of frivolity to which the court held him accountable suffers from unconstitutional vagueness. This contention completely lacks merit.

Busto cites *International Technical Instruments, Inc. v. Engineering Measurements Co.*, 678 P.2d 558 (Colo. App. 1983), as support for his allegation that Rule 38(d) of the Colorado Appellate Rules is unconstitutionally vague. (See Petition, pp. 11-12). This case does not support his claim. Rather than declaring "frivolous" to be a vague standard, the Colorado Court of Appeals upheld a definition of this term that had been applied by a trial court. The court's opinion contains no implications that the standard of "frivolous", prior to this definition, was unconstitutionally vague.

Even if the standard of "frivolous" contained in Rule 38(d), Colo. App. R., is deemed to be facially vague, that vagueness has been cured by state court constructions. *See Mission Denver Co. v. Pierson*, 674 P. 2d 363 (Colo. 1984). When a state court has construed a state statute or regulation, and that construction removes the statutory vagueness, this Court has held that the state court's construction is binding. *State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940). The Colorado Supreme Court has construed the statute so as to overcome Busto's vagueness challenge.

In *Mission Denver Co.*, cited above, the Colorado Supreme Court adopted a definition of "frivolous" to be applied in cases involving Rule 38. Specifically, that court held "that an appeal should be considered frivolous if the proponent can present no rational argument based on the evidence or law in support of a proponent's claim or defense, or the appeal is prosecuted for the sole purpose of harassment or delay." *Mission Denver Co.*, 674 P.2d at 366. The Colorado Court of Appeals applied this standard to Busto's appeal, as appears from its opinion. (See Appendix to Petition, p. A-4). Busto's vagueness challenge must fail.

CONCLUSION

Martin respectfully requests this Court to impose sanctions upon Busto pursuant to 28 U.S.C. § 1912 (1982) and this Court's inherent powers. 28 U.S.C. § 1912 empowers this Court to award damages and single or double costs, if the Court determines that an appeal is frivolous. *See Betz v. United States*, No. 84-1816, slip op. (10th Cir. Jan. 22, 1985) (interprets 28 U.S.C. § 1912 to allow federal courts of appeal to impose sanctions for frivolous appeals). In addition, courts have the inherent power to impose sanctions on litigants and their counsel to deter frivolous filings. *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

Busto's petition for a writ of certiorari is frivolous. Busto failed to raise and preserve his first two issues in the previous proceedings. In addition, his first issue was rendered moot due to the fact Busto obtained the relief for which he claims he was denied due process. Busto's final issue does not present a federal question. The Colorado Court of Appeals complied with federal due process standards and the challenged rule is not vague due to state court construction. Busto's claim of lack of notice is demonstrably false.

Martin respectfully requests that Busto's petition for a writ of certiorari be denied and that Martin be awarded its attorneys' fees and costs, which Martin will establish by affidavit, or otherwise as this Court may direct.

Respectfully submitted,

HOLME ROBERTS & OWEN
KENNETH J. BURKE
JOHN R. WEBB
KATHERINE J. PECK
Counsel for Respondent
1700 Broadway, Suite 1800
Denver, Colorado 80290
(303) 861-7000

APPENDIX "A"

DISTRICT COURT
COUNTY OF JEFFERSON
STATE OF COLORADO

Case No. 80-CV-3763

REPORTER'S TRANSCRIPT

MARTIN MARIETTA CORPORATION,
Plaintiff,

v.

JERRY T. BUSTO,
Defendant.

The Trial in this matter commenced on Tuesday, July 6, 1982, before the HONORABLE JOSEPH LILLY, Judge of the District Court.

FOR THE PLAINTIFF: JOHN R. WEBB (1876)

FOR THE DEFENDANT: PRO SE JERRY T. BUSTO

Excerpts from Transcript

THE COURT: We haven't decided the question of costs.

MR. WEBB: There is one other matter I'd like to raise with Your Honor, too, since Judge Perricone did not hear the trial, you pointed out the matter of costs.

THE COURT: Perhaps. I don't think Judge Perricone wants to pass on that since Judge Perricone disqualified himself and since I heard the trial. Maybe denial of new trial ought to wait decision of costs first, don't you think?

MR. WEBB: Perhaps, Your Honor, and the related question of attorney fees under 13-17-101.

THE COURT: I'm going to show this. Strike that Order on the motion for new trial. I'm just going to show it was filed this date.

And do you want to set a day for the decision of the matter of costs and attorney fees now?

MR. WEBB: I would prefer to, Your Honor.

THE COURT: All right. What day do you have in mind?

MR. WEBB: Basically, the sooner the better and we can get it all wrapped up next Monday or Tuesday.

THE COURT: It's all right with me. Does that meet with your approval, Mr. Busto?

APPENDIX "B"

In The
COURT OF APPEALS
For The State Of Colorado

No. 82 CA 0892

MARTIN MARIETTA CORPORATION, a Maryland Corporation, *Plaintiff-Appellee,* *vs.* JERRY T. BUSTO, *Defendant-Appellant.*	APPEAL FROM THE DISTRICT COURT OF THE COUNTY OFJEFFERSON No. 80-CV-3763 IN TRIAL COURT THE HONORABLE GASPAR PERRICONE JOSEPH LILLY JUDGES

BRIEF OF THE DEFENDANT-APPELLANT

Thomas W. Koelling
Attorney for Defendant-Appellant
7180 West 14th Avenue
Lakewood, Colorado 80215
Phone: 237-5415
Reg. No. 11814

Excerpts from Brief

II. THE TRIAL COURT ERRED IN NOT RULING ON THE DEFENDANT-APPELLANT'S MOTION FOR A CHANGE OF JUDGE AND SUBSEQUENTLY SELECTING ITS SUCCESSOR AND PROCEEDING TO TRIAL.

Rule 97 C.R.C.P. (Addendum B) specifically states that "upon the filing by a party of such motion all other proceedings in the case shall be suspended until a ruling is made thereon." Mr. Busto filed a Motion for Assignment to a Different Judge supported by affidavit on June 30, 1982, (Record Index P. 102–104). A ruling by the then trial judge was never entered of record, the case was assigned to another judge and the trial proceeded on July 6, 1982. Since no ruling was ever entered, the trial should have been suspended until a ruling was made on Mr. Busto's motion. Such an action is required by Rule 97 C.R.C.P. Rule 97 was enforced by the Colorado Supreme Court, *en banc*, in *Leone Co. v. Dist. Court*, 150 Colo. 47, 48 (1962). In the *Leone* case the trial court ruled on other matters after a motion under Rule 97 had been filed and before a ruling on the motion under Rule 97 had been filed and before a ruling on the motion was made by the trial court. The petitioner filed an original action in the Supreme Court asking that all further proceedings be stayed until the trial court ruled on the Rule 97 motion. The Supreme Court in its ruling stated that "the rule is, therefore, made absolute in part and the trial court is ordered to suspend all proceedings other than to rule upon the motion to disqualify. . . ." This position was reaffirmed by the Colorado Supreme Court, *en banc*, in the case of *Brouwer v. District Court of First Judicial District*, 455 P.2d 207 (1969). In this particular case, a ruling was immediately made upon the motion. The motion was denied. The Supreme Court in upholding the denial of the motion without hearing stated "R.C.P. Colo. 97 does not require a hearing on such a motion but rather requires that all other proceedings in the case shall be suspended until a ruling is made thereon. The court ruled thereon and, therefore, it did not lose jurisdiction to proceed." Mr. Busto's filing of his Motion for Assignment of Case to a Different Judge

under Rule 97 C.R.C.P. "had the effect, as a matter of law, of suspending any further proceedings until the judge ruled on the motion to disqualify." *City of Trinidad v. District Court, etc.*, 581 P.2d 304 (1978 *en banc*). The trial court being without jurisdiction to proceed, its judgment is void and should be vacated and remanded for a new trial after a ruling on Mr. Busto's motion has been entered. *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220 (10th Cir. 1979); *Weaver Const. Co. v. District Court in and for El Paso County, 4th Judicial District*, 545 P.2d 1042 (Colo. 1976); *In re Marriage of Stroud*, 631 P.2d 168 (Colo. 1981).

The record is silent as to how Judge Lilly received the case in question after Mr. Busto filed his motion to disqualify. While Appellant's counsel herein was not involved with the proceedings at that time, Plaintiff-Appellee's counsel who was involved then stated in his Preliminary Statement, filed with this court, under Issues to be Raised on Appeal subparagraph (a) that "Judge Perricone transferred the case to Judge Lilly for trial." By leaving the motion pending and undetermined, the charge of bias and prejudice, even though unproven or defective, remains as an accusation of unfitness to proceed with the case, and logically this charge of unfitness would extend to unfitness to pick his successor or assign the case to another judge. Additionally, if a judgment rendered by a disqualified judge is void or voidable, 49 C.J.S. Judgment § 17(b), then it must necessarily follow that a judgment rendered by a successor judge in a case wrongfully assigned to him by the disqualified judge is also void or voidable. Therefore, if the statement in Appellee's Preliminary Statement is true and the record is void of evidence to the contrary, Rule 97 was violated twice in that it calls for assignment of cases to be made by the Chief Judge after disqualification of the trial judge.

APPENDIX "C"

SUPREME COURT, STATE OF COLORADO

No.

PETITION FOR WRIT OF CERTIORARI

MARTIN-MARIETTA, a Maryland corporation, *Plaintiff-Appellee,* *vs.* JERRY T. BUSTO, *Defendant-Appellant.*	APPEAL FROM THE DISTRICT COURT OF JEFFERSON COUNTY HONORABLE GASPAR PERRICONE, JUDGE JOSEPH LILLY, JUDGE COURT OF APPEALS CASE NO. 82CA0892, DIVISION II OPINION BY JUDGE VAN CISE JUDGES SMITH and BERMAN PARTICIPATING

ISSUES PRESENTED FOR REVIEW

1. Does C.R.C.P. 97 mandate that a trial judge affirmatively enter on the record a ruling on a Motion for Disqualification and is failure to comply a jurisdictional defect.

Excerpts from Petition

ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

This Petition presents an important question of first impression concerning the construction of C.R.C.P. 97 as promulgated

by this Court. The interpretation to be given Rule 97 could have a major impact on important judicial and public policies underlying Rule 97 as enunciated by this Court.

1. On numerous prior occasions this Court has been called upon to interpret and give enforcement to the language of C.R.C.P. 97 and it is necessary for this Court to do so again.

This Court has clearly held that the requisites of C.R.C.P. 97 are of jurisdictional magnitude. Thus, when a trial court fails to abide by the requisites of Rule 97 it loses jurisdiction of the case and any action or judgment entered thereafter is void. *Leone Co. v. District Court,* 150 Colo. 47, 48 (1962); *Brouwer v. District Court of First Judicial District,* 455 P.2d 207 (Colo. 1969); *City of Trinidad v. District Court, etc.,* 581 P.2d 304 (Colo. 1978); *V.T.A., Inc. v. Airco, Inc.,* 597 F.2d 220 (10th Cir. 1979); *In re Marriage of Stroud,* 631 P.2d 168 (Colo. 1981). Rule 97 has further been interpreted so as not to require a hearing on a motion thereto. *See, Brouwer Supra.* The language of Rule 97 is clear, it mandates a trial court to make a ruling on a motion for disqualification or the Court loses jurisdiction until it does. *See,* Rule 97 attached hereto as Appendix A. This Court has held such a mandate does exist in Rule 97 and a writ of mandamus may lie as a remedy to compel compliance by the trial court of its *duty* to make a ruling. *See, City of Trinidad Supra; Walker v. People,* 248 P.2d 287, 293 (Colo. 1952).

The question which arises in the factual context of this case is unique to all other reported cases concerning Rule 97. In its basic context it can be stated as "what constitutes a ruling for Rule 97 purposes or can a ruling be implied from a silent record." It is the Appellant's contention, that a ruling concerning a Rule 97 disqualification motion must affirmatively appear of record. A ruling as required by mandate of Rule 97 cannot materialize or be fabricated by ienuendo [*sic*] from a totally silent record. While the opinion of the Court of Appeals fails to squarely address

the issue, by implication of its holding to the facts of this case, the only principal that can be drawn from its opinion is that no ruling need appear of record. Thus, a ruling by silence or implication is sufficient to satisfy the mandate of Rule 97.

Were this Court to allow the Court of Appeals holding to stand, it would seriously undermine the policies underlying Rule 97 as set forth in the recent decision of *Holland v. District Court*, 674 P.2d 952 (Colo. 1984). In *Holland*, this Court in addressing a matter concerning the same motion before the same judge as appears here, held that the right of a party to a hearing before a fair and impartial tribunal is basic to our system of justice and therefore, *not only the actuality of fairness* but the *appearance of fairness* as well, must concern the courts. Therefore, courts must *meticuously* [*sic*] *avoid any* appearance of partiality in order to maintain public confidence in judicial integrity.

The Court of Appeals decision here stands for the proposition that since Judge Perricone did not preside at trial he must have disqualified himself and therefore, no prejudice was incurred by Mr. Busto. The fallacies with applying that type of rationale to Rule 97 are several. First, perhaps Judge Perricone did not disqualify himself but only had a scheduling conflict. Secondly, perhaps Judge Perricone did not disqualify himself but chose to pick an alternate Judge to keep from having to disqualify himself. Thirdly, if that line of reasoning is used in a situation such as this, where a motion for disqualification is filed against a judge and he doesn't rule on the motion but ultimately doesn't preside over subsequent proceedings, it must also be applied to a situation where a motion for disqualification is filed and the trial judge again doesn't rule on the motion but does preside over subsequent proceedings. In which case the moving party, attempts to bring an action to compel a ruling. The trial judge or opposing party need only reply that it can be implied from the fact that the trial judge still presides that a ruling denying the motion was entered or meant to be entered. That being the case, the moving party would

have no means to attack or challenge the courts' inaction or ruling. Lastly, it causes the parties to the action to be forced to play a wait and see game with the Courts. A party files his motion to disqualify and then is compelled to wait and see what happens. If the judge continues in the proceeding, you can assume he denied your motion but if another judge appears at the next proceeding, you can assume he granted your motion. Such a procedure which the Court of Appeals in its ruling herein invites, is simply not conducive to fundamental notions of fair play and substantial justice as has been held to be contained in the basic concept of due process of law. The Court by not openly dealing with a motion for disqualification leaves the motion pending and undetermined with the charge of bias and prejudice, even though unproven or defective, remaining as an accusation of unfitness by the Court. In doing so, the Court invites error and doubt resulting in public confidence and judicial integrity withering away in speculation and conjecture. The Court in allowing the procedure of the of the [*sic*] trial court in this case to go uncorrected sanctions such conduct and deprives Mr. Busto due process of law. Every procedure which would offer a possible temptation to the average man as judge denies the individual due process of law. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

It is Appellant's contention that the Court of Appeals should not have assumed as fact something which does not appear of record (the disqualification) and base its ruling thereon (no prejudice no error). *See, Smith v. Davis*, 45 S.E.2d 237, 240 (Ga. App. 1947); 5 *C.J.S. Appeal and Error* § 1534 p. 1051. It has been held that failure to comply with the provision of a mandatory legal directive constitutes error per se and must be deemed to be prejudicial. *Ferderer v. Northern Pacific Ry. Co.*, 26 N.W.2d 236, 241 (N.D. 1947).

In the same context, arises the question of how did Judge Lilly come to preside over the trial. Rule 97 provides that "upon disqualifying himself, a judge shall notify forthwith the chief judge

of the district who shall assign another judge in the district to hear the action. Judge Lilly was a judge from another district (Denver) not the 1st Judicial District. Was Judge Lilly assigned by the chief judge of the 1st Judicial District or was he assigned by or at Judge Perricone's request. A judge against whom a motion for disqualification is filed may not select his successor or assign the case to another judge. *Aaberg v. District Court*, 319 P.2d 491 (Colo. 1957).

It is the Appellant's contention that the record presented to the Court of Appeals affirmatively showed error. The disregard of a mandatory legal directive and should be held to constitute excess jurisdiction of the court, error per se and deemed to be prejudicial. *See Colorado Appellate Practice—Anatomy of an Appeal*, p. 41, CLE in Colo. 1982. The decision rendered by the Court of Appeals runs contra to the policies enunciated by the Court in *Holland* and a long line of cases construing Rule 97, as well as, due process of law. For the reason above stated, this Court should exercise its discretionary power and grant Appellant's Petition for Writ of Certiorari.

APPENDIX "D"

In The

COURT OF APPEALS

For The State Of Colorado

Case No. 82 CA 0892

MARTIN MARIETTA CORPORATION,
Plaintiff-Appellee,

v.

JERRY T. BUSTO,
Defendant-Appellant.

MOTION FOR SANCTIONS

Pursuant to Colorado Appellate Rule 38(d), plaintiff-appellee Martin Marietta Corporation respectfully moves the Court to award damages, in the amount of attorneys' fees incurred on appeal, and double costs, on the basis that this appeal is frivolous.

This appeal is at issue, and has been set for argument on Tuesday, April 3, 1984. At the argument, counsel will be prepared to respond to any questions by the court concerning the propriety of sanctions.

HOLMES ROBERT & OWEN
JOHN R. WEBB

Attorneys for plaintiff-appellee Martin Marietta
1700 Broadway, Suite 1800
Denver, CO 80290
(303) 861-7000

CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 26th day of March, 1984, service of motion for sanctions was effected by placing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Thomas W. Koelling, Esq.
1112 N. Wasatch Ave.
Colorado Springs, CO 80903

APPENDIX "E"

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No._____

Courtroom_____

MARTIN MARIETTA CORPORATION, a Maryland corporation, *Plaintiff,* *v.* JERRY T. BUSTO, *Defendant.*	VERIFIED COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION

Plaintiff Martin Marietta Corporation ("Martin") complains against defendant Jerry T. Busto ("Busto") as follows.

1. Martin is, and at all times pertinent has been a Maryland corporation authorized to do business in the State of Colorado, having its principal Colorado facility in Jefferson County.

2. Plaintiff is a resident of the State of Colorado, County of Jefferson, residing at 790 Depew, Lakewood, Colorado 80214.

3. At all times pertinent prior to December 1, 1980, Martin employed Busto, most recently as a technician.

4. During 1979, and perhaps somewhat earlier, in connection with Busto's employment by Martin, Busto acquired knowledge

of a process for extending the life of carbon electrodes used in the electrical manufacture of steel, by application of a coating to the electrodes (the "subject technology").

5. The subject technology is proprietary to Martin due to its development by persons in Martin's employ, who were hired by Martin to invent, and who, at various times, were specifically assigned duties related to development of the subject technology.

6. The subject technology has not been patented by Martin and, to Martin's knowledge, has not been otherwise patented.

7. The subject technology constitutes a trade secret insofar as (a) its existence is not known outside of Martin, either to the general public or to persons, other than Martin, engaged in related work, (b) its existence is known only to a small number of Martin employees, (c) Martin has taken measures to guard its secrecy, (d) it would have great value to Martin's competitors, and (e) it could not be developed without either substantial investment of resources or improper and unlawful use of the work of Martin.

8. The subject technology has a potential commercial value of several million dollars.

9. Disclosure of the subject technology, before it can be patented, would cause Martin immediately to suffer irreparable injury because disclosure would destroy the trade secret status of the subject technology and could preclude its being successfully patented by Martin.

10. In connection with his employment by Martin, Busto and Martin entered into an agreement, (a true and correct copy of which is attached hereto as Exhibit A), whereby Busto agreed to preserve the confidentiality of Martin's proprietary information.

11. On or about December 3, 1980, John G. Taussig, Jr., Esq., on Busto's behalf, sent to at least five officers of Martin a packet

containing a demand letter and settlement proposal concerning various disputes between Busto and Martin, a 14 page narrative statement entitled "liability," a 14 page verified complaint (not yet filed) and copies of business records of Martin, including a two page "idea report B." (True and correct copies of the December 3, 1980 letter and of the draft complaint are attached hereto as Exhibits B and C.)

12. The "liability" statement and the "idea report B" contain information about the subject technology sufficient to destroy the status of the subject technology as a trade secret and to preclude its patentability by Martin, if the contents of these documents were further disclosed, such as by including the "idea report B" as an exhibit to a court filing.

13. As the owner of the subject technology, Martin has an affirmative legal duty, in the face of threatened disclosure, to take steps necessary to preserve the status of the subject technology as a trade secret.

14. Martin is entitled to a preliminary and permanent injunction forbidding Busto from further disclosure of information related to the subject technology.

WHEREFORE, plaintiff Martin Marietta Corporation prays for judgment in its favor and against defendant Jerry T. Busto in the form of a preliminary and permanent injunction forbidding Busto, under pain of contempt, from disclosing any information acquired by Busto during the course of his employment related to processes for preserving the carbon electrodes used in steel manufacturing.

HOLME ROBERTS & OWEN
RICHARD L. SCHREPFERMAN (0648)
JOHN R. WEBB (1876)

Attorneys for Plaintiff
1700 Broadway, Suite 1800
Denver, Colorado 80290
(303) 861-7000

Address of Plaintiff:
P.O. Box 179
Denver, Colorado 80201

VERIFICATION

COUNTY OF JEFFERSON
STATE OF COLORADO } ss.

Phillip L. DeArment, affiant herein, being duly sworn on oath, deposes and says that, by virtue of his position as Assistant Patent Counsel to Martin Marietta Corporation, Denver Aerospace Division, he has personal knowledge of, and is competent to testify concerning the allegations of the foregoing verified complaint, and that said allegations are true and correct to the best of his information and belief.

_____

Phillip L. DeArment

Subscribed and sworn to before me this day of December, 1980.

My commission expires:

_____

Notary Public

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF JEFFERSON

STATE OF COLORADO

Civil Action No. 80-CV-3763, Division 2

MARTIN MARIETTA CORPORATION, *Plaintiff,* *v.* JERRY T. BUSTO, *Defendant.*	AMENDED COMPLAINT

Plaintiff Martin Marietta Corporation ("Martin") submits the following amended complaint pursuant to Rule 15(a), Colo. R. Civ. P., on the basis that no responsive pleading to Martin's verified complaint for preliminary and permanent injunction has been filed by defendant Jerry T. Busto ("Busto").

COUNT I—PRELIMINARY AND PERMANENT INJUNCTION

Martin incorporates by reference herein and realleges each and every allegation of paragraphs 1 through 14 of the verified complaint for preliminary and permanent injunction filed herein.

COUNT II—DECLARATORY JUDGMENT

15. Martin incorporates by reference herein the allegations of paragraphs 1 through 6, 8, 10 and 11 of Count I.

16. This count arises under Rule 57, Colo. R. Civ. P., and C.R.S. 13-15-101 *et seq.* (1973), and is in the nature of a prayer for a declaratory judgment.

17. Martin and Busto are persons interested under, and whose legal relations are affected by the "employee patent and confidential information agreement," Exhibit A to the verified complaint, as well as to at least one predecessor agreement.

18. An actual controversy has arisen between Martin and Busto concerning rights in the subject technology including rights that Martin contends are established in its favor by the agreements described in paragraph 17 above.

19. Martin is entitled to a declaratory judgment establishing the validity of the agreements described in paragraph 17 above, and Martin's complete ownership of the subject technology thereunder, to the exclusion of any claim by or interest of Busto in the subject technology.

WHEREFORE, plaintiff Martin Marietta Corporation prays for judgment in its favor and against defendant Jerry T. Busto, for all relief sought in the initial verified complaint, for a declaratory judgment establishing the validity of the above described agreements and Martin's complete ownership of the subject technology thereunder, for interest, costs, attorneys' fees and such other and further relief as this Court deems just.

HOLME ROBERTS & OWEN
RICHARD L. SCHREPFERMAN (0648)
JOHN R. WEBB (1876)

Attorneys for Plaintiff
1700 Broadway, Suite 1800
Denver, Colorado 80290
(303) 861-7000

CERTIFICATE OF MAILING

The undersigned hereby certifies that service of AMENDED COMPLAINT was effected by placing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

John G. Taussig Jr., Esq.
2260 Baseline
Boulder, Colorado 80302

Date: January 16, 1981

No. 84-1349

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

JERRY T. BUSTO, *Petitioner*

v.

MARTIN MARIETTA CORPORATION, *Respondent*

AFFIDAVIT OF SERVICE

STATE OF COLORADO }
COUNTY OF DENVER } ss:

I, John R. Webb, depose and say that I am an attorney in the office of Holme Roberts & Owen, attorney of record for Martin Marietta Corporation, the Respondent herein, and that on March 25, 1985, pursuant to Rule 28.3, Rules of the Supreme Court, I served three copies of the foregoing Brief in Opposition on Petitioner, Jerry T. Busto, the petitioner herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid to 790 Depew Street, Lakewood, Colorado 80214.

All parties required to be served have been served.

Subscribed and sworn to before me on March 25, 1985.

Notary Public

My Commission Expires Sept. 30, 1986

Office - Supreme Court, U.S.
FILED
MAR 26 1985
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-1349

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JERRY T. BUSTO,
Petitioner,

vs.

MARTIN MARIETTA CORPORATION,
A MARYLAND CORPORATION,
Respondent.

On Writ of Certiorari from the Colorado
Court of Appeals

SUPPLEMENT TO BRIEF IN OPPOSITION RULE 28.1 STATEMENT

HOLME ROBERTS & OWEN
KENNETH J. BURKE
JOHN R. WEBB
KATHERINE J. PECK
Counsel for Respondent
1700 Broadway, Suite 1800
Denver, Colorado 80290
(303) 861-7000

BEST AVAILABLE COPY

3 pp

MARTIN MARIETTA CORPORATION
SUBSIDIARY COMPANIES

Australian Master Builders Company Sdn. Bhd.
Australian MasterBuilders Company Pty. Ltd.
EO Systems Holdings Corporation
EO Systems International, Limited
Embecon (S.A.) (Pty.) Limited
Embecon Master Builders (Pty.) Ltd.
Embecon New Zealand Limited
Hachiyo Concrete Consultant Co., Ltd.
Industrias Tecnoconcreto De Colombia S.A.
Inmuebles Rentables, S.A. De C.V.
International Light Metals Corporation
MDTT, Inc.
Master Builders (Europe) N.V.
Master Builders De Venezuela, C.A.
Master Builders Do Brasil Aditivos Para Concreto Ltda.
Master Builders Middle East Ltd.
Master Builders S.A.
Nisso Master Builders Co., Ltd.
Plant Engineering Company
Pozzolith (Thai) Company, Limited
Pozzolith Bussan Co., Ltd.
Splice Sleeve Japan, Ltd.
Taiwan Concrete Admixture Co., Ltd.
Tecnocreto, S.A De C.V.
Tennessee Innovation Center, Inc.
Traitements Techniques Des Betons

The above list of companies is a complete list of all Martin Marietta Corporation subsidiary companies, not wholly owned. Martin Marietta Corporation has no parent or affiliates.

No. 84-1349

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

JERRY T. BUSTO, *Petitioner*

vs.

MARTIN MARIETTA CORPORATION, *Respondent*

AFFIDAVIT OF SERVICE

STATE OF COLORADO
COUNTY OF DENVER } ss:

I, Katherine J. Peck, depose and say that I am an attorney in the office of Holme Roberts & Owen, attorney of record for Martin Marietta Corporation, the Respondent herein, and that on April 2, 1985, pursuant to Rule 28.3, Rules of the Supreme Court, I served three copies of the foregoing Supplement to Brief in Opposition—Rule 28.1 Statement on Petitioner, Jerry T. Busto, the petitioner herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid to 790 Depew Street, Lakewood, Colorado 80214.

All parties required to be served have been served.

Katherine J Peck

Subscribed and sworn to before me on April 2, 1985.

Nancy Chamberlain

My Commission Expires Sept. 29, 1986

Office • Supreme Court, U.S
FILED
APR 8 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1349

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JERRY T. BUSTO
Petitioner,

vs.

MARTIN MARIETTA CORPORATION
A MARYLAND CORPORATION
Respondent.

On Writ of Certiorari from the Colorado
Court of Appeals

REPLY TO BRIEF IN OPPOSITION

JERRY T. BUSTO
790 Depew Street
Lakewood, Colorado 80214
(303) 237-1062 or 237-9373
Petitioner, Pro-se

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No. 84-1349

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JERRY T. BUSTO
Petitioner,

vs.

MARTIN MARIETTA CORPORATION
A MARYLAND CORPORATION
Respondent.

On Writ of Certiorari from the Colorado
Court of Appeals

REPLY TO BRIEF IN OPPOSITION

STATUTES INVOLVED IN THE CASE

1. Rule 97 of the Colorado Rules of Civil Procedure

RULE 97. CHANGE OF JUDGE

A judge shall be disqualified in an action in which he is interested or prejudiced, or has been of counsel for any party, or is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper for him to sit on the trial, appeal, or other proceeding therein. A judge may disqualify himself on his own motion for any of said reasons, or any party may move for such disqualification and a motion by a party for disqualification shall be supported by affidavit. Upon the filing by a party of such a motion all other proceedings in the case shall be suspended until a ruling is made thereon. Upon disqualifying himself, a judge shall

notify forthwith the chief judge of the district who shall assign another judge in the district to hear the action. If no other judge in the district is available or qualified, the chief judge shall notify forthwith the court administrator who shall obtain from the Chief Justice the assignment of a replacement judge.

RULE 38. Sanctions

(d) *Sanctions for Frivolous Appeal.* If the appellate court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

REPLY TO ARGUMENT

Counsel for Respondent, in his Brief in Opposition, argues that Petitioner, Jerry T. Busto ("Busto") falsely asserts in his statement of the case that the record is void of any ruling on Petitioner's motion for a change of judge. To support his argument Counsel for the Respondent refers to (Appendix to Petition, p-17) and (Appendix A of Brief in Opposition). Both of these references are portions of the trial transcript in which Judge Lilly, who presided at the trial states, "you have assignment to a different judge as you requested." and "Judge Perricone disqualified himself." These two statements by Judge Lilly cannot be construed to comprise a proper ruling on the motion for a change of judge. It remains a mystery as to *how* and by *whom* Judge Lilly was appointed as successor judge.

Rule 97 provides that any party may move for disqualification and that upon the filing by a party of such a motion all other proceedings in the case shall be suspended until a ruling is made thereon. Upon disqualifying himself a judge shall notify forthwith the *chief judge of the district who shall assign another judge.* Two statements made at the trial by a judge whose jurisdiction is in question cannot be construed as a ruling. The record remains void of a proper ruling on the motion.

Counsel for Respondent argues that although Busto raised an issue concerning his motion for a change of judge, he questioned the requirements of Rule 97 of the Colorado Rules of Civil Procedure and not procedural due process requirements. The requirements of a Rule of Civil Procedure and procedural due process requirements cannot be separated. *Lucas v. District Ct.*, 140 Colo. 510, 345 P.2d 1064 (1959) "The Colorado Rules of Civil Procedure are patterned after the Federal Rules." *In re City of Coral Gables, Fla.*, 1 F.R.D. 600 (1941) "The new Federal Rules contemplate an orderly administration of justice, and recognize all the provisions of the Constitution in regard to due process. The Supreme Court has held: "Due process expresses requirements of fundamental fairness. . . . . In its Fourteenth Amendment, our Constitution imposes on the states the standards necessary to insure that judicial proceedings are fundamentally fair." *Lassiter v. Dept. of Soc. Serv. of Durham City*, 452 U.S. 18, 25, 34; 101 S. Ct. 2153, 2158, 2163; 68 L.Ed. 2d 640 (1981).

"Due process of law (it is said) undoubtedly means in the due course of legal proceedings according to those *rules* and forms which have been established for the protection of private rights," *Westervelt v. Gregg*, 12 N.Y., 209.

The words "due process of law," when applied to judicial proceedings, "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L. Ed. 565; *Scott v. McNeal*, 154 U.S. 34, 46, 14 S. Ct. 1108, 38 L. Ed. 896.

If time were available, Petitioner would amend his Questions Presented for Review in the Petition for Writ of Certiorari to include whether Petitioner's constitutional right to due process was violated when Jefferson County District Court of Colorado violated Rule 97 (CRCP) by not following its mandate to halt the proceedings until a ruling was made on the motion for a change of judge. As the record remains void of a legal and proper ruling on said motion it must be assumed in

all fairness that no ruling was ever made. To hold a trial in light of these facts was to grossly abuse justice and deny Petitioner his most fundamental constitutional rights. Had Rule 97 been followed according to mandate Petitioner would have had the time desperately needed to obtain counsel and he would not have been forced to fight alone for his rights against a multi-million dollar corporation.

On or about June 11, 1982 Petitioner went alone without counsel to the pre-trial hearing. At the hearing he explained his situation to Judge Perricone of Jefferson County District Court. His attorney, Jack Taussig, had been allowed to withdraw at an emergency hearing without giving prior notice, Petitioner was given no advice as to his rights concerning this withdrawal and no inquiry into why Jack Taussig withdrew was held. Since his attorney had been allowed to withdraw, Petitioner had tried to hire seven different attorneys to represent him. Petitioner presented Judge Perricone with letters of refusal from five of these attorneys and explained that the other two, Elizabeth Meyer and Jim Kissel had led Petitioner to believe up to the night before the pre-trial hearing that they would represent him. Elizabeth Meyer had possession of Petitioner's file and had answered Petitioner's interrogatories with him. The night before the pre-trial hearing, Elizabeth Meyer had informed Petitioner that neither she nor Jim Kissel would represent him. Petitioner then made a motion for continuance based on the above facts. Judge Perricone denied the motion.

Petitioner made a motion for a change of judge. (See Appendix D of Writ). In this motion Petitioner again stated the facts of why and how he was without counsel through no fault of his own. Judge Perricone knew that if he properly followed the mandate of Rule 97 (CRCP) concerning the change of judge, the proceedings would come to a halt, the trial would be postponed, and Petitioner would have time to obtain counsel to represent him. Because Rule 97 was never properly followed, Petitioner was deprived of his property (co-owner rights to a

multi-million dollar invention) without due process of law as guaranteed by the Fifth and the Fourteenth Amendments to the United States Constitution.

At the trial on July 6, 1982 after learning to his complete surprise that his case was being heard by Judge Lilly due to the fact that Judge Perricone had a "heavy case load," Petitioner presented his prepared motion for continuance (See Appendix A) to Judge Lilly. This motion also stated why and how Petitioner was without counsel. Judge Lilly denied the motion and the trial was conducted anyway. Throughout this case Respondent has painted a picture of Petitioner as a man who didn't try very hard to obtain counsel, when the exact opposite is true.

Counsel for Respondent falsely asserts that the case involved trade secrets and not a patent. **On December 11, 1980 Counsel for Martin filed an action against Busto in Jefferson County District Court to enjoin Busto from disclosing information about the subject technology of the invention in question. Contained in this court filing was a description of the subject technology. Colorado law makes court filings available to the public for inspection. On July 23, 1981 Busto discovered the description of the subject technology in the court filing. He filed a motion with the Jefferson County District Court to have the file suppressed to protect the *trade secret* value of the invention. (See Appendix B)**

Judge Perricone denied Busto's motion saying that "to suppress a file is a sure way to get the press involved." On July 30, 1981 after being advised by Busto of the situation, Martin joined Busto in a motion to the court to suppress those portions of the file which contained the subject technology. (See Appendix C) Judge Perricone then proceeded to grant the motion when before he had denied Busto. Martin assured the court after having its legal staff go through the file that all portions containing the subject technology had been isolated for suppression.

In November of 1981 Busto again discovered that the file still contained the subject technology in the original court filing by Martin dated December 11, 1980. U.S. patent law states that after public disclosure one year's time exists in which to apply for a patent. Martin called for an emergency hearing for the purpose of temporarily lifting the injunction so that a patent could be applied for. On December 11, 1981 Martin applied for a patent. By their own actions in entering a document containing a description of the subject technology in the court file which was open to public inspection, Martin destroyed the *trade secret* status of the invention a whole year and a half before the trial.

Counsel for the Respondent argues that a determination by a state court that an appeal is frivolous, thus entitling the prevailing party to recover double attorneys' fees pursuant to the state's procedural rules does not present a federal question. Counsel for Respondent further argues that Busto presents a constitutional issue only if the Colorado Court of Appeals utilized an impermissably vague standard. The Colorado Court of Appeals denied the Petitioner due process of law in holding him accountable for a standard that was vague. The Colorado Supreme Court has held that the standard of determining frivolousness prior to *International Technical Instruments, Inc. v. Engineering Measurements Company*, 12 Colo. Law 1983 (Colo. App. 1983), were vague. Petitioner's Appeal and corresponding briefs were filed prior to *International*, therefore, Petitioner was not adequately apprised of what constituted a frivolous appeal and cannot subsequently be penalized for committing a wrong that did not exist at the time. If the standards were vague, the Petitioner cannot be held accountable for not complying with or violating them. To do so denies Petitioner due process of law.

Counsel for Respondent states that Counsel for both Martin and Busto presented arguments before the Colorado Court of Appeals on Martin's Motion for sanctions in which it requested recovery of its attorneys' fees and costs. Counsel for

Busto did in fact use the one minute allowed for oral argument on this motion. When Counsel for Martin stood to present his one minute of oral rgument he was told by the Court to sit down because his argument was not necessary. This certainly gives the appearance of prejudice by the court. It seems obvious that the court had already decided the issue without bothering to hear all the facts. The court did in fact award attorneys' fees and double costs to Martin.

In Martin's Motion For Sanctions (See Appendix "D" of the Brief in Opposition) it is stated that the Appeal was at issue and had been set for argument. It does not clearly state that one minute of oral argument will be set aside for argument on sanctions exclusively. Counsel for Petitioner was told to use the time allowed him for oral argument to present his strongest arguments. The wording of the motion is misleading. As a result of this Counsel for Petitioner was taken by surprise when the court announced the one minute's time for oral argument on sanctions. He did however do his best and as stated above the court felt it unnecessary to even hear Counsel for Respondent's oral argument, having made their decision already.

Even were the Petitioner's Appeal to be frivolous, which Petitioner denies, the Colorado Court of Appeals award of damages in the nature of reasonable attorneys' fees is *directly contra* to the Colorado Supreme Court's holding in *Re the Marriage of Mann*, 655 P.2d 814 (Colo. 1982) and Division III of the Court of Appeals holding in *Re the Marriage of Trask*, 580 P.2d (Colo. App. 1978).

In *Mann* the Colorado Supreme Court after maintaining the appeal as frivolous refused to award the appellee attorneys' fees because she failed to specify an amount of damages in her motion. The rule 38(d) motion filed by Martin herein likewise failed to state any amount of damages. The Colorado Supreme Court's decision in *Mann* is in conformity with the Court of Appeal's decision in *Trask*, when the Court of Appeals granted attorneys' fees pursuant to C.A.R. 38 because a specific amount was requested and supported by an accompanying affidavit.

Counsel for Respondent argues that Busto's objection to the assigned judge was rendered moot by the fact that a different judge heard the case. Rule 97 of the Colorado Rules of Civil Procedure states that a judge should not appoint his own successor. *Aaberg v. District Court*, 136 Colo. 525, 319 P.2d 491 (1957) "When a judge is charged with bias and prejudice and sustains a motion so charging, or steps aside without ruling on the motion, proper procedure requires that he not select his successor or assign the case to another judge but that he proceed in accordance with this rule. The Court of Appeals of Colorado should not have assumed as fact something which does not appear of record and base its ruling thereon (no prejudice no error). See *Smith v. Davis*, 45 S.E. 2d 236, 240 (GA. App. 1947); 5 C.J.S. *Appeal and Error* § 1584 P. 1051. It has been held that failure to comply with the provisions of a mandatory legal directive constitutes error per se and must be deemed prejudicial, *Ferderer v. Northern Pacific Ry. Co.*, 26 N.W. 2d 236, 241 (N.D. 1947). Since there is nothing in the record to indicate that Judge Perricone disqualified himself properly or that Judge Lilly was chosen in the proper manner according to the mandate of Rule 97, Counsel for the Respondent's argument that Busto's objection to the assigned judge was rendered moot is *false*.

If the Petition on Writ of Certiorari from the Colorado Court of Appeals is granted, Petitioner will have an attorney who is a certified member of the bar of the United States Supreme Court represent him at oral argument.

CONCLUSION

A review on writ of certiorari is not a matter of right, but of judicial discretion. The case should be one of imperative public importance. What can be of more importance to the public than to preserve the right of each human being to a fair trial? To conduct a trial in which one man through no fault of his own is forced to fight alone for his rights as a human being against a multi-million dollar corporation is a gross abuse of justice. Petitioner has been forced to file his petition for writ of certiorari pro-se. He should not be penalized for this while Respondent with unlimited funds and the best counsel money can buy is allowed to ignore the Rules of Civil Procedure and make up its own rules to suit its own purposes. Federal due process requires that a person may not be deprived of life, liberty, or property without due process of law. By allowing Jefferson County District Court of Colorado and the Colorado Court of Appeals to ignore the rules of civil procedure as stated by Rule 97 of the Colorado Rules of Civil Procedure, Petitioner is denied his constitutional right to due process of law as guaranteed by the Fifth and the Fourteenth Amendments to the United States Constitution.

Petitioner respectfully requests that this honorable court use its power of judicial discretion to grant his petition for writ of certiorari and by doing so uphold the right of each person to a fair trial. Without a fair trial wrong is sure to triumph over right.

Respectfully submitted,

JERRY T. BUSTO, PETITIONER PRO-SE
790 Depew Street
Lakewood, Colorado 80214
(303) 237-1062 or 237-9373

APPENDIX "A"

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF JEFFERSON
STATE OF COLORADO

Civil Action No. 80-CV-3763

MARTIN MARIETTA CORPORATION	)	
Plaintiff,	)	
	)	DEFENDANT'S
vs.	)	MOTION FOR A
	)	CONTINUANCE
JERRY T. BUSTO	)	
Defendant.	)	

COMES NOW the Defendant, Pro-se, Jerry T. Busto, and respectfully requests that this Court grant his MOTION FOR A CONTINUANCE. As grounds in support of his motion, the defendant states the following:

The Defendant is without legal representation due to the fact that the Court allowed his attorney of record to withdraw without a hearing or an inquiry into the reasons for the withdrawl *(sic)*, and without advising Defendant of his rights concerning this withdrawl *(sic)*.

Defendant has tried in vain to retain the following council *(sic)* to represent him in this matter; Jerry Spence, Joseph Branney, Paul Baca, Leo Gemma, Scott Robinson, Elizabeth Meyer, and Jim Kissel.

Each of these attorneys has declined because of the insufficiency of time in which to prepare for such a complex case, or because of prior commitments. Elizabeth Meyer and Jim Kissel lead Defendant to believe that they were going to represent him, and informed him the day before the pretrial hearing that they could not. Defendant is not an attorney, and is unable to prepare for this trial without council *(sic)*. Defendant needs a

continuence *(sic)* in order that he may obtain proper council *(sic)* to represent him.

Due to the foregoing, Defendant respectfully requests that this Honorable Court grant his MOTION FOR A CONTINUENCE *(sic)*.

Respectfully submitted,

Jerry T. Busto, Defendant, pro-se
790 Depew Street
Lakewood, Colorado 80214
237-1062

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of DEFENDANT'S MOTION FOR A CONTINUENCE *(sic)* was deposited in the United States Mail, postage prepaid, addressed to the following; on this 6th day of July 1982.

John R. Webb
1700 Broadway
Denver, Colorado 80290

Marla J. Busto

APPENDIX "B"

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF JEFFERSON
STATE OF COLORADO

Civil Action No. 80-CV-3763, Div. 2

MARTIN MARIETTA CORPORATION	)	
Plaintiff,	)	
	)	MOTION
vs.	)	TO
	)	SUPPRESS
JERRY T. BUSTO,	)	
Defendant.	)	

COMES NOW THE DEFENDANT, JERRY T. BUSTO, and moves this court for the suppression of Action No. 80-CV-3763-Div. 2. I respectfully make this motion to prevent the technology that represents the subject matter of this action from falling into the hands of anyone who may request to see this file. The specifics of the invention in question are contained on page 2, paragraph 2 of the REPLY BREIF *(sic)* IN SUPPORT OF MOTION TO MODIFY PRELIMINARY INJUNCTION., filed on June 22, 1981. This same technology representing subjuct *(sic)* matter of this action is contained in IDEA REPORT (B), filed June 5, 1981.

Respectfully submitted,

Jerry T. Busto 07-23-81
790 Depew Street
Lakewood, Colorado

APPENDIX "C"

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July 30, 1981

Judge Gaspar F. Perricone
District Court
Hall of Justice
1701 Arapahoe
Golden, CO 80419

Re: **Martin Marietta Corporation v. Busto**

Dear Judge Perricone:

With respect to the concern expressed in chambers on July 28 concerning potential destruction of the value of the subject technology through information contained in the Court file, Martin Marietta's position is as follows:

1. Martin Marietta joins in Mr. Busto's motion that the entire file be suppressed.

2. To the extent that the Court declines to suppress the entire file, but will suppress certain particular filings, Martin Marietta has examined the file, and requests that two documents, together with attachments thereto, be suppressed:

(a) Defendant's Consolidated Brief on Pending Motions, filed on or about June 3, 1981; and

(b) Reply Brief in Support of Motion to Modify Preliminary Injunction, filed on or about June 22, 1981.

Martin Marietta would prefer to present this matter by way of a stipulation. However, a certain amount of confusion continues to surround the status of Mr. Busto's representation. For this reason, and in the interest of time, with the hope that a stipulation may later be reached, Martin Marietta respectfully requests that the Court remove the above-described documents, and hold them separately in a secure place, subject to the Court's review in connection with the September 9 hearing.

Respectfully,

John R. Webb

JRW:my

cc: John G. Taussig, Jr., Esq.
Jerry T. Busto